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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1191

AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and CRAWFORD MANUFACTURING CO., INC.,
Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INTRODUCTION

Amalgamated Clothing Workers of America, AFL-CIO (referred to herein as the Union) has petitioned for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit in this matter.

The National Labor Relations Board has previously petitioned for a Writ of Certiorari in the same case, Case No. 1050. Respondent Crawford Manufacturing Company, Inc. (herein called the Company) has filed its brief in opposition to the Board's petition, but since the Union requests review of questions not presented by the Board, this brief response in opposition is submitted.

Point I—The Layoffs

The Union, unlike the Board, seeks to have this Court review the Fourth Circuit's determination that alleged discriminatory layoff of eight employees was not supported by substantial evidence.

The facts show that the layoffs in question, from various departments in the plant, occurred on February 19, 1965, during a "business slump." The particular employees were in departments where the loss was greatest. Company testimony to this effect was corroborated by business records. Employees selected for layoff were those having the lowest seniority, a practice followed by the Company for years. The Board arbitrarily minimized or disregarded this "contradictory evidence or evidence from which conflicting inferences could be drawn" and substituted its own "business" judgment for that of the Company. The Fourth Circuit denied enforcement, holding:

> However, we see no acceptable basis for this discredit of the company. Its officers testified to the business slump and cited company records in corroboration. We discern no falsification here. Even if mistaken, it was a managerial judgment not impeached as mala fide. (Board's Pet. App. A, pp. 18-19).

Thus, the Court found there was "no acceptable" basis to discredit the Company explanation and make a contrary finding. Accordingly this is not a case, as the Union

argues, where "substantial evidence" supports "two conflicting views." This is a case where substantial evidence did not support the Board's decision to reject the Company's explanation as pretextual. Nor was there substantial evidence to "impeach as mala fide" the Company's judgment. The Fourth Circuit, citing *Universal Camera Corp.*, refused to abdicate its judicial functions, and stated that its task was to determine "whether substantial evidence on the whole record" sustained the Board's findings. (Board's Pet. App. A, p. 16). The Court determined it did not.[1]

Point II—The "Card Checks"

As noted in our brief in opposition to the Board Petition for a Writ in Case No. 1050, the Fourth Circuit refused to enforce the Board's bargaining order based upon authorization cards, because the authorization cards were signed under a "pervading and prevalent misconception" as to the purpose of the cards "generated" by the union organizers' representations (Board's Pet. App. A, p. 22).

The Union requests review of this conclusion on the grounds that "The Fourth Circuit has, in virtually all cases recently decided by it, rejected the notion that validly obtained authorization cards may create a duty to bargain with a union." This assertion is in error. In our original brief in opposition, it was pointed out that the Fourth Circuit followed the judicially accepted view that authorization cards may be invalidated by misrepresentations of the solicitor, and that it did not predicate its conclusion

1. This is not a "credibility" case, but it is interesting to observe that in this case two separate Trial Examiners heard the evidence. The decision, which was by the second Examiner, discredited a witness for the Company who testified only before the first Examiner "in view of my observations of her demeanor on the stand" (J.A. 97). The finding was not disturbed by the Board.

upon the subjective intent of the signers. (Brief, p. 5). This has now been re-emphasized by the Fourth Circuit in *National Labor Relations Board* v. *Lifetime Door Company*, ... F.2d ..... (4th Cir. 11,295, February 1, 1968), wherein the Court recognized:

> The Courts have uniformly held that absent a good faith doubt as to the Union's majority, the employer is obligated to bargain [if the union has a card majority]. *NLRB* v. *Sehon Stevenson & Co.*, ... F.2d ..... (4th Cir. 1967). . . .

The Court went on to find "The record is barren of any evidence of a good faith doubt as to the reliability of the cards." It therefore granted enforcement of the Board's bargaining order which was based on validly obtained authorization cards. The concurring opinion of Judge Boreman further explained the Court's position in "card check" cases:

> We accepted in *Logan* the Board's finding of coercive questioning and surveillance of employees after the union's demand for bargaining; but we reached the conclusion that all of the specifics in the record tended to enhance, rather than diminish, the company's doubt of the union's claim and that if the company had any information tending to support the union's claim the record failed to disclose it. We refused to enforce the Board's order requiring the company to bargain with the union and rejected the finding that the company had refused to bargain in violation of the Act. However, we did recognize that the employer's duty to bargain follows actual recognition of union representation or under circumstances where recognition is wrongfully withheld when the union clearly represents a majority of the employees and the employer has no doubt of it. In short, on the facts in *Logan*, we concluded that there was no duty on the company to recognize the union or to bargain with it.

Crawford was decided by the Fourth Circuit on the same day as *Logan,* and the Court's reasoning on "card check" is the same in both cases, on the facts present in each.

We submit that the *Lifetime Door* case undercuts completely the argument of the Union (and the Board in its Petition) that the Fourth Circuit decisions are based upon "subjective intention," or that the Court is refusing to recognize authorization cards, validly obtained, without misrepresentation as to their purpose.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Union's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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